In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 46

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the contention in respondent's brief (Br. 7–8) that the government's argument rests on the false premise that the informant *consented* to participate in the electronic monitoring.

1. The record shows that the informant, Harvey Jackson, actively worked with regular narcotic agents at his home and elsewhere for at least eight days (Dec. 9, 10, 11, 14, 28, and 29, and Jan. 5 and 7) over a period of approximately a month. Before each meeting with respondent, Jackson first traveled alone to a street rendezvous with the regular narcotic agents, who searched him for narcotics and strapped a trans-

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mitting device to his person. On the four occasions that the informant drove to his own home to meet with respondent, an agent accompanied him (see, *e.g.*, A. 21). On the other occasions, the informant drove alone while an agent followed him in another car (see, *e.g.*, A. 50). After his meetings with respondent, Jackson returned to a rendezvous point, where he was again searched and the transmitting device removed from his person (see, *e.g.*, A. 29, 52–53). In all, there were at least eight occasions, between December 9, 1965 and January 7, 1966 that the informant went alone to have the transmitting device placed on his person.

It is clear that if Harvey Jackson had been a regularly employed government agent, there would be no substantial question, even in the absence of direct evidence of consent, that the overhearings were consensual. Where a regular employee of the government is outfitted with a monitoring device to be carried in the course of his assignment, the government is in effect a participant in the conversations and has itself authorized the radio transmission. See *Lopez* v. *United States*, 373 U.S. 427.

This same approach to the issue of consent is applicable in the present case. The informant Jackson was not employed on a single occasion, but was engaged to participate in a series of narcotics transactions. Although Jackson's employment was temporary, he performed services for the government on several occasions involving a high degree of risk. In these circumstances, there is no sound reason not to extend

to Jackson's activities the same inference applied in the case of a regular agent that the use of the radio transmitter was consensual. It is reasonable to infer that one who acts as an undercover agent for the government over a substantial period and who, as Jackson did here, worked without direct supervision of regular narcotics agents did so voluntarily. Indeed, in light of the many opportunities for the informant to cease his activities for the government, the extreme form of coercion which might have rendered his continuing cooperation involuntary is difficult to imagine.

It is frequently true that an informant's cooperation with the government, whether or not a monitoring device is used, may be motivated by a desire to avoid prosecution or to secure some monetary reward. But as the court said in *United States* v. *Zarkin*, 250 F. Supp. 728, 737 (D.D.C.):

> We can think of no time in which a party to a telephone conversation would permit the police to intercept that conversation when he, himself, would not seek something from the police in return, assuming he is of sound mind and knows that police are police. * * * However, so long as pressure is not initiated by the police for the purposes of overbearing the will of the party, this Court does not believe that the authorization given by the party is involuntary.

See also *McClure* v. *United States*, 332 F. 2d 19 (C.A. 9); *Good* v. *United States*, 378 F. 2d 934, 936

(C.A. 9).[1] The informant may also be motivated to carry the device for his personal safety. As we pointed out in our main brief, use of the device may help protect him both during a narcotics transaction, by providing a lifeline to nearby agents, and after such a transaction, by removing any reason to harm him in order to escape conviction. These motivations, however, do not suggest any violation of the Fourth Amendment rights of the person with whom the informant engages in narcotics transactions; with or without the device, the informant does not "see, hear, or take anything that was not contemplated, or in fact intended." *Lewis* v. *United States,* 385 U.S. 206, 210.

To be sure, there may be cases in which the informant was pressured to such an extent as to deprive him of his free will and make him the equivalent of a mechanical "bug" (see *United States* v. *Laughlin,* 222 F. Supp. 264 (D.D.C.)). Thus, where the circumstances of the informant's cooperation with the government give some indication that improper pressures may have been exercised, further inquiry is necessary. But, in the absence of such circumstances, which are not present here, there is no reason to assume that the informant has been coerced either to act as a government agent or to carry a monitoring device. See

[1] *United States* v. *Jones,* 292 F. Supp. 1001 (D.D.C.), on which petitioner relies, was, in our view, incorrectly decided, since there should be no question that a person, acting upon the advice of an attorney, can consent to the carrying of a monitoring device. The district court decision in that case is presently pending on appeal in the court of appeals. Compare *Good* v. *United States, supra.*

United States ex rel. Dixon v. *Pate*, 330 F. 2d 126 (C.A. 7).

2. Respondent neither moved to suppress any evidence under F. R. Crim. P. 41(e), nor did he suggest to the trial court that it hold a hearing outside of the presence of the jury to inquire into the circumstances under which the informant Harvey Jackson worked with the federal narcotics agents. Respondent's objections during the presentation of the government's evidence did not suggest that he believed that the cooperation of the informant was caused by governmental overreaching; indeed he made no specific claim of a Fourth Amendment violation in respect of the monitoring device until the close of the government's direct case.[2]

[2] As our main brief pointed out, respondent's initial objection to testimony from the agent who hid in the informant's kitchen closet was on the ground that respondent had "no way of telling what the conversation was" since the informant could not be located (A. 23–24). He next objected to testimony concerning a telephone conversation which the informant had allowed the same agent to hear on the ground that the telephone monitoring was a "violation of the law both of Illinois and federal law, and the Federal Constitution" (A. 26). When evidence was first introduced about what was heard over the radio receiver—agent DeFauw's testimony about the December 9 narcotics transaction—there was no objection (A. 40–44). When DeFauw testified that he overheard on the radio receiver the transfer of funds in the informant's home on December 10, respondent objected on the ground that "[t]his was a conversation over a radio and the objection was made before, your Honor, that the radio communication was in violation of the statute" (A. 46). (Our main brief at p. 8 erroneously states that there was objection to the first transmitted conversation instead of the second transmitted conversation). At the close of the government's case, respondent initially moved to exclude the radio conversations on the ground they violated the Illinois Eavesdropping Statute and the public policy of

Since respondent did not claim at trial that the monitoring was not consensual, the government's evidence did not focus on the conversations between the informant and the regular agents as to the arrangements regarding his carrying of the device. The first witness, Agent Carl Jackson, however, did testify, when questioned on cross-examination, that the informant gave him permission to hide in the closet (A. 40). He also stated that the informant gave him permission to monitor the first telephone call between the informant and respondent (A. 25).

In this Court, respondent seeks to profit from his own silence at trial by claiming that the record does not "confirm the government's contention that the informant 'consented' to anything," including the electronic eavesdropping (Br. 7). If respondent believed that his rights were violated by a nonconsensual overhearing, he should have raised that issue in the trial court. The government did not have to come forward and meet an issue not raised. *Bumper* v. *North Carolina*, 391 U.S. 543, is not to the contrary, since the defense in that case, by its motion to suppress evidence, raised the question of the constitutional validity of the search; and the issue of the householder's consent to the search, on which the State relied to establish its legality, was litigated at the hearing.

With respect to the claim that respondent "was prevented at trial from cross-examining government

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the State of Illinois. After the prosecutor pointed out that the overhearing did not violate federal policy or federal law, the court denied the motion. Respondent then asked whether the court took into consideration both the Fourth and Fifth Amendments (A. 91).

agents about their relationship with the informant" (Br. 8, n. 2, 17), his transcript references (Tr. 62–67, 88, 247–248, 254, 315, 332), only show that the court sustained objections to a variety of defense questions. At no point however, do these questions indicate that the defense was trying to probe the issue of consensual monitoring. Indeed, respondent's silence on the issue at trial indicates that his present complaint is an afterthought.[3]

Respectfully submitted.

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NOVEMBER 1969.

[3] Although we did not distinguish in our main brief between conversations overheard at the informant's home and elsewhere, we note that in *Alderman* v. *United States*, 394 U.S. 165, 179, n. 11, this Court implied that a person who converses in a home and is overheard has no valid objection if the owner or occupant of the premises consents to the surveillance.

U.S. GOVERNMENT PRINTING OFFICE: 1969